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DEL MAR SEAFOODS, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DEL MAR SEAFOODS, INC. ) Case No.: CV 07-02952 WHA  
Plaintiff, )  
vs. )  
BARRY COHEN, CHRIS COHEN (aka )  
CHRISTENE COHEN), *in personam* and )  
F/V POINT LOMA, Official Number )  
515298, a 1968 steel-hulled, 126-gross ton, )  
70.8- foot long fishing vessel, her engines, )  
tackle, furniture, apparel, etc., *in rem*, and )  
Does 1-10, )  
Defendants, )  
And Related Counterclaims )  
Honorable William H. Alsup )

Plaintiff DEL MAR SEAFOODS, INC. ("Del Mar") submits the following opposition to defendant's motion for award of attorneys' fees and costs.

## I. INTRODUCTION

Supreme Court and Ninth Circuit precedent require that the attorneys' fees awarded

1     “must be ‘reasonable in relation to the success achieved.’” *Hensley v. Eckert*, 461 U.S. 423,  
 2     434 (1983); *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805, 810 (9<sup>th</sup> Cir. 1994).

3                 Del Mar asserts that following the “lodestar method” for calculating attorneys’ fees  
 4     as set forth in *Morales v. City of San Rafael*, 96 F.3d 359 (9<sup>th</sup> Cir. 1996) and *Kerr v. Screen  
 5     Extras Guild, Inc.*, 526 F.2d 67 (9<sup>th</sup> Cir. 1975), the reasonable fee in this case is no more than  
 6     \$34,400 (a sum equal to the actual damages awarded for the wrongful arrest). This  
 7     opposition addresses the various “lodestar” factors as applicable to the pending motion.

8                 **II. STATEMENT OF FACTS**

9                 The facts and legal issues in this case were not complex. Del Mar alleged that the  
 10   Cohens owed a substantial sum of money to Del Mar, while the Cohens alleged that they  
  11   owed only \$27,000. The sums alleged by Del Mar included advances that were made to  
  12   Barry Cohen at various times over a period of years. Although the Cohens denied these sums  
  13   were owed, the Court held that they “clearly” were:

14                 “...personal advances were made to Mr. Cohen by Del Mar in the amount of  
 15   \$22,035.48. Such advances were clearly covered by the mortgage and  
  16   secured by the mortgage. In addition, subsequent advances for improvements  
  17   of the F/V POINT LOMA were made in the amount of \$16,021.33. These  
  18   also were clearly covered by and protected by the mortgage. Contrary to the  
  19   defense, further paperwork was not required to add these amounts to the  
  20   mortgage, for it already covered any future advances made by Del Mar to the  
  21   Cohens.”

22                 (FF at 4:11 – 16)

23                 The Cohens also complicated this trial by denying their obligation to pay certain  
 24   unsecured debts including the debts of their two sons and amounts Barry Cohen had  
  25   promised to pay in legal fees from an earlier case. Despite the denials, the Court found  
  26   against the Cohens on all of these items. As the court found in its *Findings of Fact and  
  27   Conclusions of Law After Bench Trial* (“FF”):

28                 There is no question that Mr. Cohen agreed to be responsible for certain  
  29   additional items, even if they were not secured by the vessel.

30                 (FF at 11:20 – 21).

31                 These unsecured debts included the debts of his two sons, Michael and Leonard. (FF

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1 at 12:5 – 8). It also included inventory taken by Mr. Cohen. (FF at 12:9 – 10). The Cohens  
 2 were also found to owe Del Mar for legal fees it incurred in earlier litigation between Mr.  
 3 Cohen and the Avila Beach Harbor District. (FF at 14:7 – 17: “This item...is anchored in a  
 4 straightforward promise by Mr. Cohen to Del Mar.”).

5 Thus, although the Court found that the Cohens were not in default under the Note at  
 6 the time that the Vessel was arrested, the Court found that, contrary to the positions taken by  
 7 the Cohens, they owed virtually all of the money that Del Mar contended that they owed.

8 The other major issue in the case was the alleged damages suffered by the Cohens for  
 9 the arrest of their fishing vessel. The Cohens contended throughout the case that they had  
 10 lost substantial income as a result of the Vessel being arrested including both fishing profits,  
 11 the value of a stolen fishing net, and the cost for advances to the Captain and crew. After a  
 12 summary adjudication motion the Court threw out the claim for the loss of the fishing net,  
 13 and after trial the court allowed only the advances given to the Captain and not to the crew.  
 14 The Court in total awarded roughly one quarter of the damages the Cohens' claimed, and this  
 15 was just \$34,400.<sup>1</sup>

16 In the end, the case turned on the testimony of just a few witnesses (just seven  
 17 witnesses testified at trial) and a few documents. Of the witnesses called, three of them were  
 18 called only because the Cohens denied responsibility for the debts of their sons. These  
 19 witnesses were the two sons and Chris Cohen, and all three's testimony were by deposition  
 20 reading. These depositions and the time they took in Court could have been avoided had the  
 21 Cohens not denied liability for the debts that the Court found there was “no question” they  
 22 had agreed to be responsible for.

23 Similarly, the Cohens denied that they were responsible for paying the legal fees that  
 24 Del Mar incurred in the Avila Beach litigation, and some time in this case was spent  
 25

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26 At the outset of this case, and up until the summary judgment motion and trial, the Cohens claimed damages  
 27 of \$146,250.78. This amount was comprised of \$127,750.78 in lost fishing income for the two months that the vessel  
 28 was under arrest, \$16,000 in costs for the stolen fishing net, and \$2,500 in the Cohens' alleged “estimated costs  
 relating to the litigation.” Declaration of Gregory W. Poulos, ¶18. At trial, The Cohens had claimed \$68,000 in lost  
 fishing profits alone, plus the costs of the payments to the crew and the value of the stolen fishing net. See, TT at  
 26:24 – 27:5. The total recovery of \$34,400 is thus less than a quarter of what was alleged.

1      deposing Mr. Cohen on these debts and presenting evidence about them at trial. As noted  
 2      above, the Court found that these debts were legitimate and founded in Barry Cohen's  
 3      "straightforward promise to pay."

4           In awarding the Cohens attorneys' fees, the Court should consider that the entire case  
 5      would have been simpler, quicker, and cheaper to litigate had the Cohens and their counsel  
 6      not denied the debts that were at issue or multiplied by more than a factor of four their  
 7      damages for the arrest of the Vessel.

8           The Court should also be aware that Del Mar tried to reach a settlement of this case  
 9      on several occasions and even offered the Cohens a "walk away" which would have left them  
 10     in a far better position than the end result. Declaration of Gregory W. Poulos ("Poulos  
 11     Dec."), ¶ 9.

12           The Cohens also fought unnecessary legal battles. For example, they brought a  
 13     motion for a protective order to prevent the taking of the deposition of Mrs. Cohen even  
 14     though they had designated Mrs. Cohen as a witness in their Rule 26 disclosures. The Court  
 15     held that their motion for a protective order "should never have been brought." Declaration  
 16     of Max L. Kelley ("Kelley Dec."), Exhibit 2, pg. 4, lines 12-13. Another example was the  
 17     claim for the value of a fishing net that was stolen from the Cohens six weeks *after* the  
 18     Vessel was arrested.

19           In the end, it was the Cohens' denial of legitimate debts, their claims for unjustified  
 20     damages, and the filing of unnecessary motions that complicated what was otherwise a  
 21     simple breach of contract action. The Cohens' efforts to complicate the case and to run up  
 22     fees should not be rewarded with a large fee award.

### 23           **III. LAW AND ARGUMENT**

24           The attorneys' fees awarded in this case must be limited to less than \$100,000 for the  
 25     following reasons.

#### 26           **A. The Attorneys' Fees Must Be Reasonable In Relation To The Success 27           Achieved**

28           In *Hensley v. Eckert*, 461 U.S. 423, 434 (1983), and *McGinnis v. Kentucky Fried*

1      *Chicken*, 51 F.3d 805, 810 (9<sup>th</sup> Cir. 1994), the courts have held that any award of attorneys' fees must be "reasonable in relation to the success achieved." "Where the relief sought and obtained is limited to money, the terms 'extent of success' and 'level of success' are euphemistic ways of referring to money." *McGinnis*, 51 F.3d at 810. "It is an abuse of discretion for the district court to award attorneys' fees without considering the relationship between the 'extent of success' and the amount of the fee awarded." *Id.* (citing *Farrer v. Hobby*, 121 L.Ed.2d 494 (1992)).

8           An award of \$127,242 in attorneys' fees in relation to damages of \$34,000 was  
9       remanded to the district court in *McGinnis* with instructions to reduce the fee award. This  
10      remand occurred even though there was some public benefit conferred by the plaintiff in the  
11      *McGinnis* case.

12           The Court's judgment is that the Cohens are the prevailing party and they are  
13      therefore entitled to their reasonable attorneys' fees. The Cohens recovered only \$400 more  
14      than the plaintiff in *McGinnis* and conferred no public benefit. Moreover, the Court also held  
15      that the Cohens *owe* Del Mar \$128,748.07. The Cohen's *net* recovery is therefore a *loss* of  
16      \$94,348.07. At most the Cohens can claim to have *won* \$34,400 in damages (against a claim  
17      for more than four times that amount) and their attorneys' fees must bear a reasonable  
18      relationship to this modest sum. Based on the Ninth Circuit's decision in *McGinnis*, the  
19      award must be less than \$127,000 and should be in accord with what a reasonable plaintiff  
20      would be willing to pay an attorney to obtain a recovery of \$34,400. In this case, plaintiff  
21      believes the facts and the law support an award in the range of \$34,400 - \$50,000.

22           **B.      In Determining What Is "Reasonable" The Court Should Consider  
23                  Whether Substantial Settlement Offers Were Made**

24           The Court should take into consideration substantial settlement offers as a factor in  
25      determining an award of reasonable fees. *Moriarty v. Svec*, 233 F.3d 955. (7<sup>th</sup> Cir. 2000). In  
26      *Moriarty* the Court held:

27           Substantial settlement offers should be considered by the district court as a  
28      factor in determining an award of reasonable attorney's fees, even where Rule  
68 does not apply. See, *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d

1           1332, 1337 (4th Cir. 1996). Attorney's fees accumulated after a party rejects  
 2 a substantial offer provide minimal benefit to the prevailing party, and thus a  
 3 reasonable attorney's fee may be less than the lodestar calculation. *See Marek*  
 4 *v. Chesny*, 473 U.S. 1, 11, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985).  
 5 Determining whether an offer is substantial is left in the first instance to the  
 6 discretion of the district court. Nevertheless, an offer is substantial if, as in  
 7 this case, the offered amount appears to be roughly equal to or more than the  
 8 total damages recovered by the prevailing party. In such circumstances, a  
 9 district court should reflect on whether to award only a percentage (including  
 10 zero percent) of the attorney's fees that were incurred after the date of the  
 11 settlement offer.

12           As set forth in the Declaration of Gregory W. Poulos, during the mediation held on  
 13 November 15, 2007 and even thereafter, the Cohens were offered a "walk away" settlement  
 14 which would have forgiven the \$128,748.07 which the Court found that they owe Del Mar.  
 15 According to the billing records submitted by the Cohens' counsel, as of November 15, 2007  
 16 the Cohens owed \$77,928.50 in legal fees though the mediation. Adding to that the damages  
 17 that the Court found in their favor (\$34,400) means that their total "damages" at that time  
 18 were \$112,328.50 ( $\$34,400 + \$77,928.50 = \$112,328.50$ ). Del Mar was offering to "walk  
 19 away" and forgive all of the Cohens' debt which the Court has found to be \$128,748.07. The  
 20 "walk away" offer therefore would have left the Cohens in a far better position with a net  
 21 *gain* of \$16,419.57<sup>2</sup> rather than a net *loss* of \$94,348.07. Under this analysis, the settlement  
 22 offer of a "walk away" was a "substantial offer" which should be taken into consideration in  
 23 determining the fee to award.

24           The fact that the settlement offer from Del Mar at mediation was substantially greater  
 25 than what Cohen obtained at trial should be considered by the Court, and the Court should  
 26 reduce the amount of fees requested to zero for the period of time after the settlement offer  
 27 was made.

28           **C.     The Kerr Factors**

29           In *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9<sup>th</sup> Cir. 1975), the appellate court  
 30 set forth a number of factors that the district court should consider in determining an

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2           <sup>2</sup>       \$128,748.07 owed and forgiven - \$112,328.50 incurred = \$16,419.57 positive value; compare \$128,748.07  
 31 owed by Court order - \$34,400 damages recovered = \$94,348.07 still owed by Cohens.

1      attorneys' fees award. These are:

2                 (1) the time and labor required, (2) the novelty and difficulty of the questions  
 3                 involved, (3) the skill requisite to perform the legal service properly, (4) the  
 4                 preclusion of other employment by the attorney due to acceptance of the case,  
 5                 (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time  
 6                 limitations imposed by the client or the circumstances, (8) the amount  
 7                 involved and the results obtained, (9) the experience, reputation, and ability  
 8                 of the attorneys, (10) the "undesirability" of the case, (11) the nature and  
 9                 length of the professional relationship with the client, and (12) awards in  
 10                 similar cases.

11                 The Cohens' brief does not discuss any of these factors, and under the Court's order  
 12                 for presentation of attorneys' fees they are not permitted to provide a reply brief and thus they  
 13                 have failed to address key issues required by Ninth Circuit precedent. Some of these items  
 14                 may not be applicable, but others clearly are, and they are discussed below.

15                 **1. Time and Labor Required**

16                 As discussed above, the time and labor required in this case was in no small measure  
 17                 due to the Cohens' refusal to admit to owing debts that they "clearly" owed Del Mar.  
 18                 Overall, the number of depositions were kept at a minimum, but at least four of these  
 19                 depositions (Chris Cohen, Michael Cohen, Leonard Cohen, and David Cantrell) could have  
 20                 been avoided altogether had the Cohens not disputed their legitimate debts. Poulos Dec., ¶11.  
 21                 Similarly, the Cohens could have saved much time by avoiding unnecessary motion practice  
 22                 such as with the motion for a protective order.

23                 **2. Novelty of Legal Issues**

24                 The case did not present any novel legal issues. Poulos Dec., ¶13.

25                 **3. Skill requisite to perform the legal services properly**

26                 There was skill required to perform the legal services, but the skill was not beyond  
 27                 that to be normally found within the local maritime legal community. Poulos Dec., ¶13.

28                 **4. Preclusion of other Employment**

29                 There is no evidence that the Cohens' attorneys were precluded from other  
 30                 employment during this case. In fact, there were various times when Del Mar was informed  
 31                 that the Cohens' attorney would be unavailable because he was actively involved in other

1 cases, particularly a case overseas. Poulos Dec., ¶14.

2       **5. Customary Fee**

3           The Cohens have submitted legal bills and declarations showing that they were  
 4 charged \$490 per hour going to \$520 per hour by the Partner on the file (James Walsh) and  
 5 \$275 per hour going to \$350 per hour by the Associate (Gwen Fanger). These rates are  
 6 excessive and outside the norm for experienced attorneys in San Francisco handling the same  
 7 type of matters.

8           Del Mar has submitted the declarations of its own counsel showing that the hourly  
 9 rates for highly experienced Partners in San Francisco handling maritime arrest cases range  
 10 from the low to mid \$300.00 per hour figure and that the range for associates is \$200.00 -  
 11 \$250.00 per hour. See Declarations of Gregory W. Poulos, Mr. Joshua Kirsch, and Edward  
 12 Bull, filed herewith.

13           In support of the high rates charged to the Cohens, their attorneys have submitted  
 14 three declarations from the firm's lead counsel on the case and two managing Partners  
 15 responsible for setting the firm's billing rates. None of these declarations discuss the rates  
 16 charged by other firms in San Francisco handling maritime-related civil litigation.

17       **6. Whether the Fee is Fixed or Contingent**

18           The Cohens have not addressed this issue in their papers, but there is some confusion  
 19 on the point. Del Mar has asked for and received a copy of the fee agreement in which the  
 20 Cohens agreed to pay an hourly fee and to make payments monthly within 30 days of  
 21 receiving the invoice. On the other hand, the invoices submitted by their counsel shows that  
 22 *none of the legal fees have ever been paid*. Thus, there is a substantial question whether there  
 23 is some alternative fee agreement that has not been disclosed. The Court will be aware that it  
 24 is highly unusual for a law firm to allow fees of more than \$450,000 to be incurred over the  
 25 course of a year without a single payment having been made.

26       **7. Time Limitations Imposed by the Client or the Circumstances**

27           There were admittedly some time limits imposed by virtue of the Vessel's arrest at the  
 28 outset of the case, but once the Vessel was released from arrest in mid-August 2007 the case

1      proceeded on a normal schedule.

2            **8. The Amount Involved and the Results Obtained**

3      The amounts involved were a claim for approximately \$138,000 in principal plus  
 4      interest on Del Mar's claim and the Cohens' claim for roughly \$146,250 in lost profits and  
 5      other claims. Ultimately, the Cohens were found to owe virtually all of the sums claimed by  
 6      Del Mar and recovered less than a quarter of the damages they claimed.

7            **9. The Experience, Reputation and Ability of the Attorneys**

8      All counsel in this case are experienced maritime attorneys of good ability and  
 9      reputation..

10          **10. The Undesirability of the Case**

11      There was nothing "undesirable" about this case.

12          **11. The Nature and Length of the Professional Relationship with the Client**

13      Mr. Cohen filed a declaration in this case stating that he had been referred to Mr.  
 14      Walsh by another attorney, and this fact is supported by the legal bills that show a referral by  
 15      Mr. D. Wood. As a result Del Mar understands that there was no ongoing or existing client  
 16      relationship.

17          **12. Awards in Similar Cases**

18      As discussed above, the most analogous case is the decision in *McGinnis* where the  
 19      plaintiff recovered \$34,000 in damages and \$127,242 in attorneys fees, and the Ninth Circuit  
 20      reversed and remanded the case to the district court with instructions to reduce the fee award  
 21      to be "commensurate with the monetary value of plaintiff's success."

22          **D. Defendant's Hours Are Excessive For Particular Tasks**

23      The Court has requested that the parties divide their time into particular tasks so that  
 24      the Court can determine whether the time spent for that task was appropriate and comparable  
 25      to the time spent by the other party on the same tasks. Del Mar contends that some of the  
 26      time spent by the Cohens' counsel on particular tasks was excessive. The following  
 27      discussion addresses these particular items. Tables documenting both the objectionable line  
 28      items and the time expended on the same or similar task by plaintiff's counsel are attached to

1 the Declaration of Max L. Kelley as Exhibit 1.

2       **Project 16, Defendants' Deposition of Joe Cappuccio:** On 12/10/07 J. Walsh spent  
 3 1.6 hours to "Review matters regarding depositions; check rules; conference with G. Fanger  
 4 regarding the same." This time is excessive for someone of Mr. Walsh's qualifications and  
 5 experience and is not reasonable. Plaintiff respectfully requests the Court to strike this  
 6 amount in its entirety, or alternatively, to reduce it to a reasonable amount, 0.2 hours.

7       Mr. Walsh has documented \$3,920.00 in fees for 8.0 hours to "Defend deposition of  
 8 Dave Cantrell" on 12/27/07. However, not only is this line item erroneously included under  
 9 Project 16, Mr. Walsh has also included \$3,920.00 for 8.0 hours preparing for, attending,  
 10 following up, and return travel for Mr. Cantrell's deposition the same day under Project 19,  
 11 Plaintiff's Deposition of Dave Cantrell. One of these duplicative line items should be  
 12 stricken entirely.

13       **Project 24, Trial Brief:** Defense counsel document 47.5 hours spent preparing its  
 14 trial brief equating to \$16,317.50 in billed attorneys' fees, including up to 4.0 hours for legal  
 15 research regarding the parol evidence rule. In contrast, plaintiff documented only 7.3 hours  
 16 and billed \$2,315.00 in attorneys' fees for preparing its own trial brief. Defendants'  
 17 attorneys' fees for preparing its trial brief should be reduced to ten hours, a reasonable  
 18 amount of hours commensurate with plaintiff's expenditure.

19       **Project 27, Defendants' Motion in Limine re Parol Evidence Rule:** Defendants'  
 20 counsel document 28.6 hours spent preparing its *unsuccessful* motion, including an additional  
 21 3.7 hours for legal research regarding the parol evidence rule, and \$10,078.00 billed. In  
 22 contrast, plaintiff spent only 13.7 hours preparing its opposition to defendants' motion in  
 23 limine and for which it billed \$3,565.00. Kelley Dec., Ex. 1. The bringing of *unsuccessful* in  
 24 limine motions should most likely not be rewarded at all. If, however, the Court is inclined  
 25 to make some award for this Project, the time spent should be reduced to 15 hours, a  
 26 reasonable amount of hours commensurate with plaintiff's expenditure.

27       **Project 33, Settlement Conference:** Defendants' counsel document 32.1 hours to  
 28 prepare its Settlement Conference Statement for the settlement conference with J. Larson,

1      and billed \$11,626.00. This amount of time is excessive given that mediation had already  
 2      taken place and defendants' Settlement Conference Statement could easily and efficiently  
 3      have been adopted from defendants' previously prepared Mediation Brief. In comparison,  
 4      plaintiff spent only 13.3 hours preparing its Settlement Conference Statement, for which it  
 5      billed \$3,805.00. Kelley Dec., ¶ 1. Defendants' attorneys' fees for preparing its Settlement  
 6      Conference Statement should be reduced to 15 hours, a reasonable amount of time  
 7      commensurate with plaintiff's effort.

8      **Project 34, Preparation of Cross-Examination of Joe Roggio:** Defense counsel G.  
 9      Fanger spent 4.6 hours and billed \$1,610.00 to issue a trial subpoena to J. Roggio, including  
 10     3.2 hours to "analyze" and "conduct legal research regarding service of trial subpoenas." The  
 11     amount of time expended on this task is excessive for an attorney of Ms. Fanger's experience  
 12     and qualifications, accounting for the brevity of the document, *and given that counsel*  
 13     *reached an agreement to accept service of trial subpoenas on behalf of the each other's party*  
 14     *witnesses.* By way of comparison, plaintiff spent only 1.7 hours preparing its trial subpoenas,  
 15     for which it billed \$475.00. Defendants' hours and fees should be reduced to 2 hours for  
 16     preparing trial subpoenas, which is a reasonable amount and in line with plaintiff's  
 17     expenditures for the same tasks.

18      Ms. Fanger also spent an excessive amount of time preparing "Roggio witness file"  
 19      between May 5 and May 15, 2008, 9.8 hours, equating to \$3,430.00 in fees. A reasonable  
 20      amount of time to spend on such a nebulous task would be 3 hours.

21      **Project 35, Preparation for Cross Exam of Joe Cappuccio:** Defense counsel G.  
 22      Fanger documented 0.2 hours to "Analyze rules regarding issuance of trial subpoena to  
 23      Cappuccio" in addition to the 0.2 hours spent on the same task for J. Roggio's trial subpoena.  
 24      This work is redundant and unreasonable and should be stricken. Furthermore, Ms. Fanger  
 25      spent an additional 1.4 hours to prepare Mr. Cappuccio's trial subpoena, which is grossly  
 26      excessive considering her qualifications and experience, the brevity of the document, and that  
 27      counsel reached a mutual agreement to accept service of each other's party witness  
 28      subpoenas. The time counsel spent preparing Mr. Cappuccio's trial subpoena should be

1 reduced to a reasonable amount, 0.5 hours.

2       **Project 41, Defendants' Damages Analysis:** Defense counsel spent 10.0 hours and  
 3 billed \$3,500.00 to research and prepare their motion in limine to recover defendant B.  
 4 Cohen's travel expenses for attending certain proceedings in San Francisco. ***Defendants lost***  
 5 ***this motion on two separate grounds.*** A party asserting invalid claims for damages should  
 6 not be rewarded with attorneys fees when those claims are denied by the Court. Therefore,  
 7 the entire amount is excessive and unreasonable and should be stricken completely. In the  
 8 alternative, if defense counsel's efforts in bringing this motion in limine are found to be  
 9 compensable, the amount of time expended is excessive and should be reduced accordingly.

10       In contrast to the hours and fees claimed by defense counsel for this motion in limine,  
 11 plaintiff's most junior counsel and fresh out of law school, J. Taliaferro, billed only 7.1 hours  
 12 and \$770.00 in fees to oppose the defendants' motion. Defense counsel's time should be  
 13 reduced to a reasonable amount more in line with plaintiff's effort, 3-4 hours, depending on  
 14 the hourly rate ultimately used.

15       For the same reasons, \$355.00 billed for 0.9 hours spent pursuing defendants' claim  
 16 for damages for its missing fishing net should be stricken completely, or at least reduced  
 17 substantially. That issue was raised by plaintiff's motion for summary judgment and plaintiff  
 18 ***prevailed*** on that issue.

19       Plaintiff also defeated defendants' cause of action for the breach of the implied  
 20 covenant of good faith and fair dealing on summary judgment, therefore, the 100+ hours  
 21 defendants spent opposing plaintiff's motion should be reduced accordingly by 15%, the  
 22 approximate weight given to that cause of action in proportion to the motion as a whole. At  
 23 Ms. Fanger's hourly rate of \$350.00 per hour this would reduce the legal fees by \$15,000.

24       Tables referencing the specific line items for the preceding projects, as well as  
 25 plaintiff's line items for the same or similar projects are attached as Exhibit 1 to the  
 26 concurrently filed Declaration of Max L. Kelley.

27       **E.      Duplicate Time Entries:**

28       The Court's order concerning the procedure for documenting attorneys' fees provides

1 that normally having more than one attorney attending depositions or hearings is excessive.  
 2 Plaintiff objects to the defendants' line items documenting proceedings at which both counsel  
 3 for defendants' attended as being duplicative and therefore excessive and unreasonable. Only  
 4 the amount for the less experienced attorney is proposed to be stricken. A table containing  
 5 the objectionable line items is attached the Declaration of Max L. Kelley as Exhibit 1.

6 Plaintiff respectfully requests the Court strike these amounts as unreasonable.

7 **F. Unnecessary and Unrelated Legal Work:**

8 Plaintiff's objects to the following fees as being unreasonable because they were  
 9 charged for legal work that was *unrelated* to this case and the issues being litigated and were  
 10 therefore *unnecessary* and *unreasonable*. The specific line items objected to are contained  
 11 in the tables attached to the Declaration of Max L. Kelley as Exhibit 1.

12 Project 2, Release of Vessel and Related Motions: Plaintiff objects to the work  
 13 performed by defense counsel to revive the corporate status of defendant F/V Point Loma  
 14 Fishing Company, Inc. This was a business expense that should have been normally incurred  
 15 by defendants alone.

16 Project 10, Respond to Plaintiff's Document Requests: Defense counsel spent a total  
 17 of 17.9 hours and billed \$5,167.50 to contest plaintiff's request for defendant B. Cohen's  
 18 income tax records, including 4.3 hours spent by Ms. Fanger regarding the discoverability of  
 19 tax records (Project 19, 12/20/07 and 12/26/07). After several meet and confers and  
 20 following letter briefs to the Court by both sides, defendants' finally relented and produced  
 21 the requested documents. In light of defendants' stubborn and ill-conceived resistance to turn  
 22 over documents that plaintiff was clearly entitled to, and defendants themselves had put in  
 23 play, this was time and money that should never have been expended in the first place.

24 Plaintiff respectfully requests that the Court strike the entire amount as being unreasonable.

25 Project 15, Defendants' Motion for Protective Order Regarding Deposition of Chris  
Cohen: The Court will recall that defendants identified Chris Cohen, defendant Barry  
 26 Cohen's wife, as a witness in their Rule 26 disclosures and then sought to protect her from  
 27 having to be deposed. Defendants' improper efforts in that regard resulted in the need for  
 28

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1 motion practice. The Court stated during the hearing on defendants' motion for a protective  
 2 order that the motion "should never have been brought" and ordered the deposition to  
 3 proceed. Kelley Dec., Exhibit 2. Defendants should not now be awarded any attorneys' fees  
 4 for a motion that should never have been brought in the first place. Plaintiff respectfully  
 5 requests the Court strike all 35.0 spent by defense counsel on this task and the \$11,681.00 in  
 6 attorneys' fees, as well as \$780.00 in attorneys' fees for 1.5 hours spent by J. Walsh on  
 7 1/2/08 and erroneously included under Project 16 in preparing for the discovery hearing, and  
 8 the \$82.50 in fees for 0.3 hours spent by G. Fanger on 12/26/07 for analyzing the opposition  
 9 for replying to motion for protective order, also erroneously included under Project 16.

10 As plaintiff is objecting to every line item for this Project, only a summary has been  
 11 included in Kelley Dec., Ex. 1.

12 Project 43, Deposition Designations for Use at Trial: Defense counsel G. Fanger  
 13 includes \$1,015.00 for 2.5 hours for "conduct research regarding rules for out of state  
 14 subpoenas" on 5/6/08. This time is related to her own client being asked to appear for trial  
 15 and should be known to an attorney of Ms. Fanger's qualifications and experience. Plaintiff  
 16 respectfully requests the Court strike the entire amount.

#### 17 IV. COSTS

18 Per the Court's order, costs are to be determined "in strict compliance with the local  
 19 rules." Defendants have failed to submit a bill of costs, supporting affidavit(s), or any  
 20 supporting documentation as required by Local Rule 54-1(a). The Table of Defendants'  
 21 Costs that defendants have submitted lists many costs that are not allowed under the federal  
 22 and local rules. In particular, the Table lists improper costs for:

- 23 A. Unspecified copying<sup>3</sup>: (\$3,345.70)
- 24 B. Costs for Service of Copies to Court: (\$579.23)
- 25 C. Lexis Nexis Research costs: (\$5,372.50)
- 26 D. Airfare. (\$511.00)

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27 3 Under local rule 54-3(d) only certain copying costs are allowed. Since there is no breakdown of what costs  
 28 are correlated with the charges, none should be recoverable.

- E. "Working Meals" and other travel: (\$1,083.33)
- F. Local Cab Fare, parking and Car Rental: (\$536.13)
- G. "Law Library" expenses: (\$7.20)
- H. Court reporter fees for depositions taken in other matters as these are essentially copying costs: (\$2,708.05)

Defendants have failed to follow the local rules regarding submission of their costs bill, therefore, all of their costs should be disallowed. Alternatively, if the Court finds defendants are entitled to some of their costs despite their failure to follow the proper procedure, plaintiff submits defendants' costs should be reduced by the preceding improper amounts.

**Total reduction in costs per local rules: \$14,143.14.**

## V. CONCLUSION

In this case the Cohens actually lost when the Court considers that they were found to owe more than they have recovered in damages. The most that the Cohens can claim to have “won” is \$34,400 in damages for the arrest of their vessel. Under the Supreme Court and Ninth Circuit cases, their award of attorneys’ fees must bear a reasonable relationship to this recovery. It must, under the authority of the *McGinnis* case, be something less than \$127,000, and Del Mar contends it should be substantially less. Keeping in mind that the Cohens turned down a substantially better settlement offer, their fees and expenses after the mediation should be disallowed or very substantially reduced. In addition, even if the court delves into the individual tasks of the attorneys, many must be reduced as duplicative and unnecessary or excessive work.

Del Mar suggests a reasonable fee award would be between \$34,400 and \$50,000, but no more.

Dated: July 28, 2008

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